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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL LAWYERS' GUILD AND CENTER FOR CONSTITUTIONAL RIGHTS *AMICI CURIAE*

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AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The National Lawyers' Guild is an association of lawyers, law students and legal workers which seeks to defend the

rights and liberties secured under the Constitution. Many of its members are trial lawyers or persons otherwise engaged in civil and criminal litigation directed at the preservation of civil liberties. Its members are involved deeply also in the area of prisoners' rights.

The Center for Constitutional Rights is a not-for-profit corporation interested in preserving constitutional rights and civil liberties through education and litigation. It has represented many clients on civil liberties matters, including litigation in this Court.

One issue in this case is whether the federal habeas corpus statute, 28 U.S.C. § 2254, authorizes federal habeas corpus review of Fourth Amendment claims. The Amici have an on-going interest in this issue since the Court's decision could have a significant impact on the avail-

ability of a federal forum for the review of federal constitutional rights. The Amici are also concerned that the Bill of Rights remains a vigorous and effective tool for protecting the civil liberties of the American people. The Amici have received the consent of the parties for filing this brief.

SUMMARY OF ARGUMENT

This brief addresses the question put by the Court when it granted certiorari in this case: whether the habeas corpus statute, 28 U.S.C. § 2254, authorizes federal court review of Fourth Amendment claims, such as are presented here. It is a procedural question, and is distinct from the more substantive questions surrounding the Fourth Amendment and the exclusionary rule. The Court should bear the distinction in mind and consider the habeas corpus issue on its own merits, in terms of the principles and policies that argue for and against the scope of such review, not in terms of the exclusionary rule. Commingling habeas corpus and exclusionary rule doctrines would lead to murkiness and instability in both, would be ineffective in resolving any failures the

Court might perceive in the exclusionary rule and would ignore a number of carefully thought-out suggestions that have been made for modifying the exclusionary rule. Habeas corpus jurisdiction should not be used to modify the exclusionary rule.

Restricting the scope of habeas corpus review is unjustified. The Court should not overturn the long established scope of habeas corpus review unless the underlying balance of facts and principles has significantly changed since the doctrine was established. No such change has occurred here. The arguments now advanced in favor of restricting habeas corpus review were vigorously propounded in 1953, when the current rule was firmly enunciated. They have gained no additional weight during the intervening 20 years. The burden im-

posed on federal courts by Fourth Amendment habeas corpus claims remains relatively small. Very few habeas corpus petitions actually come to trial, and a miniscule number of state criminal convictions are overturned. Punishment is not delayed, since the prisoner remains in jail while he brings his petition (and most likely will remain there afterwards). Federal courts continue to hear only federal, not state, questions.

More importantly, no review standard the Court substituted for the present one would solve any of the perceived habeas corpus problems. A jurisdictional rule limited to guilt or innocence or the reliability of evidence would lead to intolerable results, denying federal review of searches conducted with stomach pumps or the bad faith seizure of personal diaries. In addition, it

would not even make a sizable dent in the number of habeas corpus petitions that would or could be brought. Other substitute rules would abandon the simplicity of the present one in favor of some balancing test, but in doing so they would only draw the federal judge into a more detailed and time-consuming examination of the state proceedings and raise the spectre of the federal judge scrutinizing the motives of the police and state judicial officers, rather than simply the correctness of their judgment.

In fact, habeas corpus review of Fourth Amendment claims continues to serve important national interests which should not be discarded. The exclusionary rule rests in part on a concept of justice and thus is properly cognizable in habeas corpus. The possibility of federal review will have some cautionary

effect on the police, so deterrence will be served. The educational effect of federal review is crucially important in a case like this, where the magistrate who issued the warrant must be taught not to accept again such a weak affidavit in support of a search warrant. Since this Court cannot hear all the Fourth Amendment claims which are urged upon it on direct review, providing an alternative federal forum, less numerous and diverse than the state courts, will encourage the development of more uniform national applications of what is, after all, a national Constitution.

ARGUMENT

I. IT WOULD BE JUDICIALLY UNSOUND TO ATTEMPT MODIFICATIONS OF THE EXCLUSIONARY RULE THROUGH RESTRICTIONS ON HABEAS CORPUS JURISDICTION

Barring habeas corpus review in this case would necessarily involve a modification of the exclusionary rule.

> [W]hen we automatically close the courthouse door solely on this basis [judicial caseload and efficiency], we implicitly express a value judgment on the comparative importance of classes of legally protected interests.
>
> Bivens v. Six Unknown Agents, 403 U.S. 388 at 411 (Mr. Justice Harlan, concurring)

But habeas corpus jurisdiction is a poor device for working changes on the exclusionary rule. Quite a few criticisms of the exclusionary rule have been voiced, and the Court is familiar with them. Limiting habeas corpus jurisdiction, however, would respond to none of

of them. Even if the exclusionary rule were eliminated from habeas corpus cases, its major impact would continue as it has at the trial and appellate levels of the judicial process.

Such a jurisdictional change would also introduce obscurity and instability into the exclusionary rule doctrine. There is not much justification for drawing exclusionary rule lines between habeas corpus petitions and other forms of delayed judicial consideration, such as appellate decisions, direct review by this Court or even a trial delayed by a crowded court docket. We know of no evidence that the deterrent effect of one is significantly different from the others. Even Professor Amsterdam has admitted that drawing the line at habeas corpus is rather arbitrary. Amsterdam, Search, Seizure and Section 2255, 112 U.Pa.L.Rev. 378, 391 (1964).

Since it is logically weak, we would not expect a distinction between habeas corpus proceedings and other proceedings to wear well, at least insofar as the exclusionary rule is concerned. Furthermore, the distinction would collapse in unpredictable ways, producing much confusion and perhaps a sense of injustice as litigants and observers tried to guess where the next changes would occur. There will continue to be much litigation involving Fourth Amendment questions, and a heavily litigated area needs clear, consistent and reasonably stable rules, not ones that are due to change.

It would be particularly inappropriate to adopt an unclear, unstable and ineffective standard in an area such as the exclusionary rule where this Court already has at its disposal a number of proposed standards that have been care-

fully thought out and address much more directly the faults perceived in the exclusionary rule. E.g., ALI, Model Code of Pre-Arraignment Procedure, Draft #1, July 15, 1972, p. 94. We do not believe that any modifications of the exclusionary rule should be undertaken, especially in the absence of effective alternative devices to protect against violations of the Fourth Amendment. But if the Court decides to change the rule, it should do so in a more coherent fashion than by modifying habeas corpus jurisdiction.

The cost of excising some parts of the Constitution from habeas corpus jurisdiction would be substantial. State prisoners would be deprived of a federal forum for their federal constitutional claims and left to the mercies of state judicial systems that from time to time do

need correction by the federal court. That cost is not justified by the limited and uncertain changes that will be wrought in the exclusionary rule by barring habeas corpus relief in this case. Instead, modifying habeas corpus jurisdiction should be justified, if at all, on the basis of concerns that are more directly tied to the operation of habeas corpus itself. We will examine such concerns in the succeeding sections and suggest that no such justification can be made.

II. HABEAS CORPUS RELIEF HAS BEEN AVAILABLE FOR ALL CONSTITUTIONAL VIOLATIONS AT LEAST SINCE BROWN v. ALLEN AND PROBABLY SINCE MOORE v. DEMPSEY. NOTHING HAS HAPPENED SINCE THE CURRENT HABEAS CORPUS DOCTRINE WAS ANNOUNCED TO JUSTIFY ABANDONING THAT RULE

It is agreed that since Brown v. Allen, 344 U.S. 443 (1953), all constitutional contentions raised in state court can be relitigated on federal habeas corpus. Kaufman v. United States, 394 U.S. 217 (1969); Schneckloth v. Bustamonte, 412 U.S. 218, 256 (1973)(Powell, J., concurring). In Brown v. Allen, Mr. Justice Frankfurter, speaking for five Justices, stated that "No binding weight is to be attached to the State determination.... The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 344 U.S. at 508. Indeed,

although the issue is the subject of much scholarly debate,*/ it is probable that habeas relief for all constitutional claims has been available since Moore v. Dempsey, 216 U.S. 86 (1923). The majority opinion in Brown v. Allen and in Fay v. Noia, 372 U.S. 391, 421 (1963), declared that it has been settled since Moore, that a federal judge has the power to disregard a state courts determination

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*/ For the proposition that Moore v. Dempsey, 261 U.S. 86 (1923) overruled Frank v. Mangum, 237 U.S. 309 (1915) see, Hart, Foreward: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 105 (1959); Reitz, Federal Habeas Corpus, Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1329 (1961). See also Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1052 (1970). Contra, D. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 488-491 (1963).

of the merits of a petitioner's constitutional claim, even where the state process is considered adequate. In addition, this Court has consistently considered, on habeas corpus, the claims of state prisoners alleging Fourth Amendment violations. Lefkowitz v. Newsome, 420 U.S. 283, at 288-293 (1975); Whitely v. Warden, 401 U.S. 560 (1971); Adams v. Williams, 407 U.S. 143 (1972); Warden v. Hayden, 387 U.S. 298 (1967).

These cases make obvious the drastic change which the proposed suggestion would work upon the Great Writ. Although the actual scope of habeas corpus review has varied with shifting concepts of due process, it has shifted uniformly for all recognized constitutional rights. Never since Brown v. Allen, and probably Moore v. Dempsey, has the Court suggested that habeas relief should not be available for

particular types of constitutional claims.

If the Court now seeks to alter the balance of values underlying broad habeas corpus jurisdiction, it should do so only if the values have been significantly disturbed by events during the intervening years. "A substantial departure from precedent can only be justified ... in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment." Mitchell v. W.T. Grant, 416 U.S. 600, 634-635 (1974)(Stewart, J., dissenting). Advocates of the proposed limitation on the scope of habeas corpus relief contend that four societal values are diminished by the availability of federal collateral review. They are: (i) the effective utilization of limited judicial resources, (ii) the necessity of finality

in criminal trials, (iii) the minimization of friction between our federal and state systems of justice and (iv) the maintenance of the constitutional balance upon which federalism is founded. Schneckloth v. Bustamonte, supra, at 259. But these values were equally present and equally important in 1953, and were fully considered in Brown v. Allen. Brown resolved the tension between these values and the constitutional rights of criminal defendants. Examination of each of the values reveals that the balance between them and constitutional rights has not changed since Brown v. Allen, and that consequently there is no justification for the proposed change in habeas corpus doctrine.

Proponents of limiting federal habeas assert that prisoners' petitions absorb too much of judges' limited time.

However, time was also limited in 1953 when the Court decided Brown v. Allen, and time was limited when the Court decided Mapp v. Ohio, 367 U.S. 643 (1961), Fay v. Noia in 1963, Miranda v. Arizona, 384 U.S. 436 (1966) and Kaufman v. United States in 1969, all of which cases predictably increased federal habeas petitions. In each case, the Court presumably weighed but ultimately rejected judicial economy as a basis for decision. Today, despite an increase in the number of petitions, the time spent by judges on habeas cases is not inordinately greater than in the last decade. Annual Reports of the Director of the Administrative Office of the Courts, 1972, '73, and '74 show several factors mitigating the impact of habeas petitions on judicial calendars: 97 to 98 per cent of petitions are disposed of before trial, with a median dispostion

time of less than one month; the number of federal judges has grown from 396 in 1961 to 667 in 1974, and support in their clerks' offices has risen correspondingly from 1,298 to 2,140; much of the increase in prisoner petitions has been in civil rights actions attacking prison living conditions, unrelated to habeas law; state prisoners' federal habeas petitions have actually declined for four straight years. See Annual Report, 1974, Tables 1, 49, 50 and C-5b. The only recent field study of habeas we know of, done from 1970 to 1972 in one judicial district confirms many of these findings. D. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973). The Court should recall Illinois Supreme Court Justice Walter V. Shaefer's reply to Justice Jackson's comparison of reading habeas petitions to looking for a

needle in a hay stack. "It is not a needle we are looking for in these stacks of paper, but the rights of human beings." Shaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1 (1956).

A second argument advanced in favor of limiting habeas relief in Fourth Amendment cases is the necessity for finality in our criminal justice system. It has been suggested that at some point prisoners must accept the fact of their conviction and look forward to rehabilitation. Schneckloth v. Bustamonte, supra, at 262 (Powell, J., concurring). But punishment is not delayed by the availability of habeas corpus. Mr. Rice has been in jail for some time and remains so, as do most petitioners with habeas claims. Since extremely few prisoners are released on habeas corpus (see 83 Harv. L. Rev. at 1041) their hope of reversal cannot be very great. It is

doubtful that depriving prisoners of the habeas remedy, and of all hope of release will encourage rehabilitation; it could as easily foster bitterness. Indeed, the possibility that prisoners' claims will be fairly considered on habeas is more likely to engender respect for the criminal justice system than to deny them all chance of relief. In addition, nothing has happened since Brown v. Allen to increase the necessity of finality.

As the statistics mentioned earlier indicate, there has not been any significant change in federal-state "friction" since 1953. The number of times a federal court actually reverses a state court has been and remains minimal. In response to the argument that federal judges improperly intruded on the state criminal process, Mr. Justice Frankfurter noted that, in view of the small numbers

of reversals, "there is no basis for thinking there is such intrusion unless 'men think dramatically not quantitatively,' --Holmes, Collected Legal Papers, p. 293--" Brown v. Allen, 344 U.S. 443, 501 (1953). He went on to point out that the very small number of state prisoners who are released also

> prove[s] beyond peradventure that it is a baseless fear, a bogey man, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence. Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.
>
> Id. at 510

Congress has not modified that statement of federal law, as it could have.

The Senate in its 92d and 93d terms had legislation introduced to limit the scope of habeas review to cases where "... the claimed constitutional violation has as its primary purpose the protection of the reliability of ... the factfinding process ..." i.e., guilt or innocence. S. 3833, 92d Congress; S. 567, 93d Congress. Both bills failed to clear committee. Mr. Justice Frankfurter's response to the federalism argument remains wholly adequate today.

Actually, the only factor that has changed since 1953 is the coverage of the Fourth Amendment exclusionary rule, which now applies to the states. Mapp v. Ohio, 367 U.S. 643 (1961). But, as we argued in the first section, above, limiting habeas corpus jurisdiction is

not an effective or institutionally sound manner to address the quite distinct problems posed by the exclusionary rule. Substantive Constitutional matters should be resolved directly, not through their procedural correlates.

III. RESTRICTION OF HABEAS CORPUS REVIEW BY EXCLUDING FOURTH AMENDMENT CLAIMS WOULD NOT REMEDY THE PROBLEMS IT PURPORTS TO SOLVE

If the Court finds habeas corpus review unavailable in this case, it must announce a standard to distinguish between reviewable and non-reviewable claims. Analysis of possible standards, however, shows that their adoption will not resolve the problems they are designed to meet. The concerns urged in favor of limiting habeas, discussed above, would continue to exist. The federal habeas caseload would not significantly decline; prisoners would continue to properly file petitions; and the potential for conflicts with the states would not be reduced, but might well be increased. Proposals to limit habeas review would seriously cripple the Fourth Amendment exclusionary rule without addressing the concerns of the

critics of the present scope of the Great Writ.

One proposed standard for limiting habeas would allow only those claims going to innocence or to reliability of the fact-finding process. Schneckloth v. Bustamonte, 412 U.S. 218 (1973)(Powell, J., concurring); Kaufman v. United States, 394 U.S. 217 (1969)(Black, J., dissenting). Such a standard would have minimal impact on the volume of habeas cases, according to the best available statistical evidence. A study conducted of 257 petitions filed in one federal district court from 1970 to 1972, revealed only 24 Fourth Amendment claims. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973). In addition, no more than 42 other petitions might have involved other constitutional claims which were

not guilt-related. Professor Shapiro concludes of Justice Powell's proposal: "...[G]iven the frequency of multiple claims in a single petition, a requirement of guilt-relatedness would not necessarily permit more petitions to be dismissed on their face." Id. at 371.

This standard would preclude federal review of some appalling Fourth Amendment violations. Not every search and seizure violation in the past has been corrected on direct appeal. E.g., Whitely v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968). If habeas review were eliminated, the number of Fourth Amendment petitions for certiorari to this Court would increase, and a lower percentage of them would be granted, leaving a higher number of search and seizure claims without redress.

Federal courts could not provide re-

lief on habeas for abuses like the one described in Rochin v. California, 342 U.S. 165 (1952), since Mr. Rochin's claims did not involve his innocence. Moreover, the standard is not logically confined to Fourth Amendment claims. Many Fifth, Sixth, and Eighth Amendment claims also do not go to innocence or the reliability of the fact-finding process. Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). Thus, a court might be placed in the position of hearing a habeas claim of improperly seized personal papers used to bear witness against a defendant at trial, and yet hold itself powerless to act. Compare Boyd v. United States, 116 U.S. 616 (1886).

Another proposed standard would be to exclude Fourth Amendment claims on habeas where the search was made in good

faith. But the difficulties of judicially separating good faith from negligence or bad faith would increase, not decrease the federal fact-finding role on habeas review. Not only would police be open to claims of bad faith, but prosecutors and magistrates would be as well. If a magistrate were to sign a warrant without reading the affidavit, or make statements showing his prejudice against the target of the search, or to in effect suspend what he knew to be the dictates of the Fourth Amendment in a self-assessed "emergency," his good faith might legitimately be questioned. Whatever federal-state friction exists now over habeas review would be infinitely increased by h a ling state magistrates into federal court for good-faith hearings.

In addition, federal court judges might be placed in the undesirable position of challenging the integrity

of state judicial processes. If a prisoner is convicted in state court despite grievous Fourth Amendment violations, and the conviction is upheld by the state appellate court, federal courts could entertain habeas corpus petitions alleging a denial of due process in the state judicial system. The granting of such relief is more likely to increase federal-state friction than is now the case when federal judges simply decide that the state court erroneously determined a question of federal constitutional law. See Note, "Federal Habeas Corpus For State Prisoners and the Fourth Amendment" 52 North Carolina Law Review, 633 at 642.

A third proposed standard to limit habeas review might be called a "balancing of interests" as proposed by the American

Law Institute. But this standard would require even more judicial fact-finding than the good faith standard, above, and merely delay federal disposition of petitions. The ALI lists seven factors, including, inter alia: the importance of the interest violated; the extent of deviation by officers and their good or bad faith; the extent of invasion of privacy; and the importance of the seized evidence to the proof of the case. Model Code of Pre-Arraignment Procedure, Draft #1, July 15, 1972, p. 94. The present case illustrates the difficulty of applying the ALI standard. Good faith is debatable since the police did not announce the staleness of their tip. The importance of the seized evidence in the case depends on the perception of each juror; there was additional evidence against the respondent. The invasion of

privacy could be called small since the police disturbed no one during the search, or large, because the search was in the defendant's home, not on the street. The extent of deviation from lawful conduct might be called small since the police had a warrant, or large, since two federal courts found little merit in any of the state's arguments justifying the intrusion. All these questions would be before a federal court if an ALI-type standard were adopted for habeas review.

Finally, whatever standard might be set by the Court in this case, we think it only fair to the respondent that the case be remanded to state court for a hearing in light of the standard, and the new issues of fact it might raise.

IV. THE AVAILABILITY OF FOURTH AMENDMENT CLAIMS AS THE BASIS FOR FEDERAL HABEAS CORPUS RELIEF SERVES SUBSTANTIAL INTERESTS WITHIN THE PURPOSE AND MEANING OF THE WRIT

A. Fourth Amendment Claims Serve Interests of Justice through the Promotion of Judicial Integrity, and are, therefore, Properly Cognizable Grounds for Federal Habeas Corpus Relief

The exclusionary rule has always embodied an element of justice. In Weeks v. United States, 232 U.S. 383 (1914) the Court grounded its holding on considerations of judicial integrity and the most fundamental notions of what constitutes justice:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.
>
> 232 U.S. at 393

See Silverthorne Lumber Co. v. United

States, 251 U.S. 385 (1920). The rationale of preserving judicial integrity is still quite alive. In Elkins v. United States, 364 U.S. 206 (1960) Mr. Justice Stewart, after citing the deterrence theory, noted "there is another consideration - the imperative of judicial integrity." 364 U.S. at 222. Following the rule in McNabb v. United States, 318 U.S. 332 (1943), where a conviction based on evidence secured in violation of federal statute was reversed, he then concluded, "[e]ven less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." 364 U.S. at 223.

The sense of justice is particularly inseparable from the exclusionary rule because we lack any effective alternative devices to enforce the Fourth Amendment.

As Mr. Chief Justice Day said in Weeks v. United States, supra: without the exclusionary rule, the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. at 393. Or, as Professor Oaks, in criticizing the rule, said, "if constitutional rights are to be anything more than pious pronouncements" there must be visible consequences attached to their violation. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970). At present there are no systematic and meaningful consequences other than the exclusionary rule, and it, therefore, is the only vehicle which can preserve the kind of fundamental justice guaranteed by the Fourth Amendment. Since the central purpose of the writ is to serve justice by remedying "unjust" convictions and confinement, Schneckloth

v. Bustamonte, supra, 412 U.S. at 257-58 (Powell, J., concurring), excluding the Fourth Amendment from the scope of federal habeas corpus relief would greatly diminish the quantum of justice the writ is intended to promote.

B. Habeas Corpus Review of Fourth Amendment Claims Has a Deterrent and Educational Effect Which Must be Preserved, Particularly With Respect to the Magistrates Who Issue Warrants

Habeas corpus review of Fourth Amendment claims has a deterrent and educational effect which should not be disregarded by this Court. It does not matter that this review may come substantially after the search and seizure in question. It is the simple fact of available review that acts as a general brake on the police, not the timing of the review. Police officers might not be expected to predict how courts will decide questions of Fourth Amendment law, but they can be expected to be careful and circumspect when treading on the borders of the Fourth Amendment. Knowing that their actions will be re-

viewed, they will be less inclined to forget the existence of the Fourth Amendment in the passions of the moment. The existence of an additional review, beyond the local judicial system to which the police belong, can only serve to enhance the cautionary effect of review. See Kaufman v. United States, 394 U.S. 217 (1969).

More important to this case is the deterrent and educational effect habeas corpus review will have on the judiciary itself. The most flagrant error in this case was made by the magistrate who signed the warrant. The affidavit on which he based the warrant was woefully insufficient, and no one appears to be arguing very strongly that it was adequate. Yet he signed the warrant, giving the patina of good faith to the subsequent home invasion carried out by

the police. Whatever might be said of the police, the judge should be expected to know the law, even in some of its finer details (although the error committed in this case did not even involve a particularly close question). He should be expected to familiarize himself with judicial decisions and keep abreast of legal developments. While few police officers may be aware of the decisions of the federal courts in this case, the judge will be. As a result, the next time an affidavit for a search warrant is presented to him, he may do the correct thing.

Correcting the local judiciary is of critical importance to the sound enforcement of the Fourth Amendment. Our system has reposed immense power in the hands of the magistrate who issues warrants, and great care must be taken to

educate that level of the judiciary and assure that mistakes do not happen twice. Once the issuing magistrate makes a mistake, the damage has been done--an improper search has taken place--and subsequent courts are left to deal with the painful task of fashioning a remedy (the exclusionary rule) that is not always satisfactory. Had the magistrate acted correctly in this case, and required the police to provide more information, either sufficient information would have been forthcoming and the case might not have lasted long in the federal courts or an illegal search would have been prevented.

Education of the magistrate becomes even more significant when one considers the searches which do not produce evidence and are thus not subject to the exclusionary rule. Those, too, should be prevented, and it is up to the magis-

trate to prevent them. The magistrate in this case is going to have many more affidavits presented to him by police officers requesting warrants. He should not repeat again and again the mistake he made here. The guidance given by the federal courts in this case should help. Even if the federal decisions only mean that the magistrate refuses to accept inadequate affidavits in a few future cases, the protection of Fourth Amendment rights thus achieved will be substantial.

One additional point should be made here. The Fourth Amendment expresses general propositions that do not by themselves plainly lead to the resolution of the myriad factual situations that arise under the Amendment. Because of this, the law must be developed by the judiciary on a case-by-case basis. See Ker v. State of California, 374 U.S. 23 (1963).

This "common law" development is a proper judicial function that is enhanced by more, not less, judicial decisions. The courts unavoidably confront new fact situations with some disagreement and varying approaches, but through the process of multiple judicial scrutiny it is hoped that some consensus can be achieved and perhaps even a rule of thumb for dealing with that particular fact situation may be developed. The uncertainty of Fourth Amendment law is not an occasion for precluding federal court review. Rather, more decisions should help to better educate the warrant-issuing magistrates.

C. Fourth Amendment Claims Should be Available in Habeas Corpus Because Federal Review Promotes Uniformity in Federal Standards

Uniformity in the application of the fundamental rights secured by the Fourth Amendment should be encouraged. The unique advantage in the availability of a

federal forum is that it allows for less variety in the institutional settings for determining Fourth Amendment law than would obtain if such decisions were left solely to the States.

Ideally there should be a single federal court in which constitutional issues are decided. This might be accomplished through the establishment of a National Court of Appeals, an idea much discussed recently, e.g., Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court, December, 1972 or through review by this Court. Both, however, prove unsatisfactory. The former is only a proposal, and this Court, quite obviously, could not assume the burden of hearing all constitutional claims.

The forum afforded by the district and circuit courts is the next best answer.

Uniformity is promoted by decision in the district courts with harmonizing review in the eleven circuit courts. Significant disparities between the circuits have always been and will continue to be resolved by this Court. Disparities among the fifty states are not so commonly addressed here.

Therefore, Fourth Amendment claims should continue to be heard in federal habeas proceedings. If not, it would be for the States to decide Fourth Amendment issues, breaking the established and congressionally mandated habeas corpus review by federal courts. The only other federal forum would be in this Court in its certiorari jurisdiction, which would result in only intermittent review of fundamental claims and an increase in petitions for certiorari.

CONCLUSION

We urge this Court to affirm the decision of the Eighth Circuit Court of Appeals below and to continue to entertain habeas corpus petitions whenever any constitutional rights are infringed. In the alternative, if the Court decides to promulgate new standards for the availability of habeas corpus relief, we ask that this case be remanded to the federal district court below so that Mr. Rice's petition can be considered in light of the new criteria.

Respectfully submitted,

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Counsel gratefully acknowledges the invaluable assistance of Laurence Futterman, Peter Greene, Harold Jacobowitz and Wayne Young, students at the Constitutional Litigation Clinic, Rutgers Law School, in the preparation of this brief.

CERTIFICATE OF SERVICE

I certify that on this 25th day of September 1975, copies of this brief were air mailed, postage prepaid, to the Honorable Paul L. Douglas, Attorney General of Nebraska, State Capitol, Lincoln, Nebraska, attorney for petitioner, and to J. Patrick Green, Esq., Suite 707, City National Bank Building, Omaha, Nebraska, attorney for respondent. I further certify that all parties required to be served have been served.

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